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FILED

JUL 27 2018

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD R. VALENTINE,

Plaintiff,

v.

KRISTJEN NIELSEN, Secretary,
Department of Homeland Security
(Customs and Border Protection),

Defendant.

Case No.: 16cv2357-W(KSC)

**ORDER RE JOINT MOTION FOR
DETERMINATION OF DISCOVERY
DISPUTE (CONTINUED
DEPOSITION OF ROSALINDA
MAIZUSS)**

[Doc. No. 38.]

Before the Court is the parties' Joint Motion for Determination of Discovery Dispute. [Doc. No. 38.] In the Joint Motion, plaintiff seeks an order compelling plaintiff's former supervisor, Rosalinda Maizuss, to appear for a continued deposition. [Doc. No. 38, at pp. 1-10.] Defendant opposes plaintiff's request for a number of reasons. [Doc. No. 38, at pp. 11-23; Doc. No. 33.]

The background for plaintiff's request for a continued deposition of Ms. Maizuss is set forth in the Court's prior Order of March 9, 2018, and the Court will not repeat that information here, except to reiterate that the discovery deadline in this case has already been continued several times, and plaintiff has had more than enough time in this case to

1 complete discovery. [Doc. No. 33, at pp. 1-14.] In the March 9, 2018 Order, the Court
2 reopened discovery until March 29, 2018 for the sole purpose of allowing plaintiff to
3 briefly re-depose four witnesses, one of whom was Ms. Maizuss. All four depositions were
4 to be scheduled for the same day and at the same location unless otherwise agreed by the
5 parties. [Doc. No. 33, at p. 14.] The March 9, 2018 Order specifically states as follows:
6 “Each of the depositions should be as brief as possible as all of these witnesses were
7 previously deposed or provided written statements.” [Doc. No. 33, at p. 14.]

8 As agreed by the parties, Ms. Maizuss was present for her deposition on March 20,
9 2018 at 2:00 p.m., as agreed. However, plaintiff’s counsel arrived late on that date, so the
10 planned depositions did not begin on time. The deposition of Edwin Manalastas, which
11 was scheduled to begin at 9:30 a.m., did not start until 9:52 a.m. [Doc. No. 38, at p. 14.]
12 Although the next deposition of Doug Hall was scheduled to begin at noon, plaintiff’s
13 counsel continued to question Mr. Manalastas until 2:32 p.m., more than two hours over
14 the scheduled time. As a result, Mr. Hall’s deposition began about 3:00 p.m. instead of
15 noon. The deposition of Ms. Maizuss did not commence until 6:15 p.m., more than four
16 hours late. [Doc. No. 38, at pp. 11, 13-14.] Defense counsel ended the deposition of
17 Ms. Maizuss about 6:30 p.m., because he could not stay any longer. [Doc. No. 38, at p.
18 15.] During the brief time he had to question Ms. Maizuss, plaintiff’s counsel did not ask
19 her any substantive questions about the facts of the case. [Doc. No. 38, at pp. 15-16.]

20 In the Joint Motion, plaintiff argues that it is “absolutely necessary” for plaintiff to
21 have additional time to depose Ms. Maizuss, because she was plaintiff’s supervisor at the
22 time at issue in the Complaint, and she is the only witness who allegedly observed the acts
23 and omissions leading to plaintiff’s termination. [Doc. No. 38, at p. 3.] Defendant argues
24 that plaintiff’s request should be denied, because the motion is untimely and because
25 Ms. Maizuss has already responded to the questions plaintiff claims he needs to ask her.
26 [Doc. No. 38, at p. 18.] In addition, defendant argues it would be prejudiced if another
27 deposition of Ms. Maizuss is allowed, because it has already filed a summary judgment
28 motion. [Doc. No. 38, at p. 18.] Defendant believes that the deposition of Ms. Maizuss

1 may have been intentionally delayed, because plaintiff hoped to obtain a continuance to
2 depose Ms. Maizuss after defendant filed its summary judgment motion in order to gain
3 some advantage in opposing the summary judgment motion. Although the Court will
4 afford plaintiff the benefit of the doubt, the facts and circumstances, as presented, are
5 supportive of defendant's suspicion. [Doc. No. 38, at pp. 11-23.]

6 "A schedule may be modified only for good cause and with the judge's consent." 7 Fed. R.Civ.P. 16(b)(4). [See also Doc. No. 9, at p. 6 (indicating that the dates in the 8 Scheduling Order "will not be modified except for good cause shown").] "Rule 16(b)'s 9 'good cause' standard primarily considers the diligence of the party seeking the 10 amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). 11 Recently, the Ninth Circuit has instructed that the following factors should be considered 12 when ruling on a motion to amend a Rule 16 scheduling order to re-open discovery: 13 "1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non- 14 moving party would be prejudiced, 4) whether the moving party was diligent in obtaining 15 discovery within the guidelines established by the court, 5) the foreseeability of the need 16 for additional discovery in light of the time allowed for discovery by the district court, and 17 6) the likelihood that the discovery will lead to relevant evidence." *City of Pomona v. SQM 18 N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017). In addition, under Federal Rule of 19 Civil Procedure 26(b)(2)(C), "the court must limit the frequency or extent of discovery . . . 20 if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or 21 . . . (ii) the party seeking discovery has had ample opportunity to obtain the information by 22 discovery in the action. . . ." Fed.R.Civ.P. 26(b)(2)(C).

23 In support of plaintiff's contention that a continued deposition of Ms. Maizuss is 24 "absolutely necessary," plaintiff cites portions of the deposition of another witness, Rosa 25 Hernandez, who indicated in response to various questions that Ms. Maizuss would be able 26 to respond to those questions. [Doc. No. 38, at pp. 8-10.] However, defendant presented 27 persuasive arguments in opposition to plaintiff's request for more time to depose 28 Ms. Maizuss, including convincing evidence that the various questions cited by plaintiff as

1 being “absolutely necessary” are either irrelevant or have already been answered through
2 other discovery. [Doc. No. 38, at pp. 20-22.] Based on this information, the Court
3 concludes that a continued deposition of Ms. Maizuss is not necessary for a fair resolution
4 of the case.

5 At this late date in the proceeding, it is also this Court’s view that plaintiff has not
6 established good cause for requiring Ms. Maizuss to appear again for a continued
7 deposition. Although the trial date has not yet been set, the wrongful termination alleged
8 in the Complaint occurred about eight years ago on July 6, 2010, and plaintiff exhausted
9 his administrative remedies thereafter. [Doc. No. 1, at pp. 3, 6.] The Complaint in this
10 action was filed on September 19, 2016, so the case has been pending in this Court for
11 almost two years, and the deadlines in the original Scheduling Order have already been
12 extended several times. [Doc. No. 33, at pp. 2-3.] Defendant’s Motion for Summary
13 Judgment is currently pending before the District Court. [Doc. No. 37.] Although the final
14 Pre-Trial Conference and related deadlines have been vacated pending the outcome of
15 defendant’s Motion for Summary Judgment, these dates will be re-scheduled, if necessary,
16 immediately following the District Court’s ruling on the Motion for Summary Judgment.
17 [Doc. No. 43.] A Case Management Conference to re-set the final Pre-Trial Conference is
18 currently scheduled for August 31, 2018. [Doc. No. 44.]

19 Based on the information provided by the parties, it is apparent that plaintiff’s
20 counsel made no real attempt to follow the agreed schedule for the depositions that were
21 set for March 20, 2018 by mutual agreement, and essentially ignored the Court’s Order to
22 keep the depositions “as brief as possible.” [Doc. No. 33, at p. 14-16.] As outlined more
23 fully above, plaintiff’s counsel arrived late to his office on March 20, 2018 (*i.e.*, the agreed
24 location for the depositions), so the first deposition started late. Even though plaintiff’s
25 counsel previously agreed to the starting times for the two remaining depositions, including
26 the deposition of Ms. Maizuss, both of these depositions began long after the scheduled
27 times. [Doc. No. 38, at pp. 12, 14-15.] Thus, without more, there is nothing to indicate
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1 plaintiff's counsel even attempted to follow the agreed schedule for the three depositions
2 on March 20, 2018.

3 Not only did Ms. Maizuss miss a day of work and wait more than four hours for her
4 deposition to begin on March 20, 2018, she was previously deposed on May 20, 2011
5 during the underlying administrative action. [Doc. No. 38, at p. 15, 20.] In addition, she
6 gave a thirteen-page written statement on December 14, 2010. [Doc. No. 38, at p. 20.]
7 Plaintiff has not presented anything to indicate the prior deposition and written statement
8 were in any way inadequate or incomplete. In addition, the events giving rise to this action
9 took place more than eight years ago, so it stands to reason that the prior deposition and
10 statement by Ms. Maizuss, which were completed earlier and closer to the events at issue,
11 are sufficient to reach a fair resolution of the current litigation. [Doc. No. 38, at p. 20-22;
12 Doc. No. 33, at p. 2.] If this was not the case, the Court would expect to see an
13 unquestionable and noteworthy effort on the part of plaintiff's counsel to make sure he had
14 enough time on the scheduled day of March 20, 2018 to question Ms. Maizuss about key
15 issues in the case. No such effort is evident on the record before the Court. [Doc. No. 38,
16 at pp. 1-23.] In other words, the record indicates plaintiff was not diligent in obtaining
17 discovery within the guidelines set by the Court. It also appears highly unlikely that
18 another deposition of Ms. Maizuss would uncover any new, relevant evidence that would
19 alter the course of the litigation.

20 Plaintiff's request for a continued deposition of Ms. Maizuss is also untimely. Fact
21 discovery in the case has been closed since September 15, 2017 and was extended three
22 times for the limited purpose of completing depositions, including the deposition of
23 Ms. Maizuss. The final deadline for completing depositions was March 29, 2018. [Doc.
24 No. 33, at pp. 2-3, 5-6, 14.] The deadline for filing pre-trial motions was April 16, 2018.
25 [Doc. No. 36, at pp. 1-2] On April 16, 2018, defendant filed a timely Motion for Summary
26 Judgment that is currently pending before the District Court. [Doc. No. 37.] Plaintiff did
27 not file the instant Joint Motion until May 4, 2018, after the pre-trial motions deadline had
28 passed. [Doc. No. 38.]

1 Based on the foregoing, IT IS HEREBY ORDERED that plaintiff's request for an
2 order compelling a continued deposition of Ms. Maizuss is DENIED as untimely and for
3 failure to establish good cause.

4 IT IS SO ORDERED.

5 Dated: July 26, 2018



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7 Hon. Karen S. Crawford
8 United States Magistrate Judge
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